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February 17, 2000 By Overnight Delivery

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
12th Street S.W. Stop-TW - A325
Washington D.C. 20554

Re: CC Docket No.3 99-333, Joint Applications for Consent to Transfer
Control Filed by MCI WorldCom, Inc. and Sprint Corporation.

Dear Ms. Salas:

The New York State Attorney General's Office submits the enclosed five copies of our
comments in response to the Federal Communications Commission's January 19, 2000 Notice.

Sincerely,

Keith H. Gordon
Assistant Attorney General

Enclosure: Electronic copy on diskette
cc:

ITS, Inc., 445 12th St. S.W., CY-B402, Washington, D.C. 20554
Ms. Lauren Kravetz, Wireless Telecommunication Bureau, Room 4-A163
Mr. Christopher Libertelli, Common Carrier Bureau, Room 5-C234 (6 copies)
Mr. Matthew Vitale, International Bureau, Room 6-A821
Mr. Jim Bird, Office of General Counsel, Room 8-C818

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Joint Applications for)
Consent to Transfer Control)
Filed by MCI WorldCom, Inc.)
and Sprint Corporation.)

CC Docket No. 99-333,

COMMENTS OF ELIOT SPITZER
ATTORNEY GENERAL OF THE STATE OF NEW YORK

The New York Attorney General's Office enforces state and federal antitrust laws and consumer protection statutes. This office is committed to advancing the development of competition in all telecommunications markets. The proposed transfer of Sprint to MCI WorldCom will have a significant impact on many of these markets, including the markets for local and long distance services. New York State is in a unique position with respect to these markets and has a strong interest in the outcome of this Petition, which requires detailed analysis and review.

This Office has not yet concluded our assessment of the facts and circumstances involved in the proposed merger of Sprint and MCI WorldCom, including an examination of the Hart-Scott-Rodino filing to the U.S. Department of Justice pursuant to 15 U.S.C.A. § 18a.

Therefore, we are submitting the comments we submitted to the New York State Public Service Commission on February 4, 2000 as our comments in this proceeding. Our inquiry is continuing and we reserve the right to submit additional comments at the time replies are due on March 20, 2000.

February 17, 2000:

Respectfully submitted,

A handwritten signature in cursive script that reads "Mary Ellen Burns". The signature is written in dark ink and is positioned above the printed name.

Mary Ellen Burns
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of MCI WorldCom, Inc. and
Sprint Corporation for Approval of the
Transfer of Sprint Corporation's New York
Subsidiaries to MCI WorldCom, Inc.

Case 99-C-1710

**Comments Of Eliot Spitzer
Attorney General Of The State Of New York
On Petition Of
MCI WorldCom, Inc. And Sprint Corporation
For Transfer Of Control**

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February 4, 2000

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Introduction

On December 9, 1999, MCI WorldCom, Inc. (“MCI/WC”) and Sprint Corporation (“Sprint”) petitioned the New York State Public Service Commission (“PSC” or “Commission”) to approve the transfer of Sprint’s New York subsidiaries to MCI/WC, as part of their proposed merger (the “Petition”).¹ On January 11, 2000, the Commission instituted this proceeding and requested interested parties to submit comments by February 4, 2000.²

The Petition states that both MCI/WC and Sprint currently provide domestic and international long distance services nationwide, as well as local telephone service in New York State. In addition, MCI/WC is authorized to offer data transmission and paging services throughout the United States, while Sprint is authorized to offer PCS wireless voice communications in “key markets” in the United States, including New York State. Both MCI/WC and Sprint own multichannel multipoint distribution services (“MMDS”) licenses in the United States; MCI/WC owns such licenses in New York State.³

Petitioners assert that this acquisition is in the public interest and that it “will have no adverse impact on the consumers of New York.”⁴ They assert that a merger will enable them to better compete with other major telecommunications carriers, in particular AT&T and the regional Bell operating companies (“RBOCs”), in the provision of

¹ These companies announced their merger agreement on October 5, 1999, with completion anticipated in mid-2000. The new entity is to be called WorldCom. *Petition*, p. 6.

² *Notice Requesting Comments*, issued January 11, 2000. Reply comments are due February 15, 2000. The proposed merger must also be reviewed by the Federal Communications Commission (“FCC”) and evaluated by the United States Department of Justice (“DOJ”).

³ *Petition*, pp. 2-4.

⁴ *Id.*, p. 7.

“integrated” telecommunications products and services such as local, long distance, and data services, and to be able to do so using “fixed, mobile, and paging wireless services.”⁵ They also assert that their merger would have a positive impact on competition in the local exchange market in New York and that it will not adversely affect competition in the long distance market.⁶

The Petition raises, but does not resolve, substantial questions about the competitive impact on telecommunications customers in New York of the second biggest acquisition to date in United States corporate history.

Interest of the Attorney General

The Attorney General is an advocate on behalf of the interests of New York consumers and of residential and small business telecommunications customers and enforces federal and state antitrust laws and consumer protection statutes. New York residents and businesses have a substantial interest in robust competition for all telecommunications services, including local, long distance, data and information services. A thriving state economy requires no less.

Much of the data relevant to the merger which will be reviewed by DOJ or the FCC has not yet been examined by this office.⁷ The views stated herein are therefore preliminary, and subject to refinement or revision as the proposed merger is examined further.

⁵ *Petition*, p. 12.

⁶ *Petition*, pp. 17-24.

⁷ For example, confidential filings required to be made to federal enforcement agencies pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, have not yet been examined by this office.

Argument

Petitioners Have Not Yet Demonstrated That The Merger Is In The Public Interest

New York law prohibits the Commission from giving consent to a transfer of control of a telephone corporation “unless it shall have been shown that such acquisition is in the public interest.”⁸ In considering this acquisition, it is appropriate and necessary for the Commission to examine the impact of MCI/WC’s proposed acquisition of Sprint on competition in all affected markets for telecommunications services in New York. Indeed, federal antitrust law forbids an acquisition where “in any line of commerce...in any section of the country, the effect of such acquisition may be substantially to lessen competition....”⁹

In the past, PSC reviews of transfer petitions have focused on the potential impact on New York customers and markets.¹⁰ That inquiry is particularly appropriate here, as New York’s current circumstances are different from those in any other state with respect to the local and long distance markets.¹¹

⁸ New York Public Service Law §100. New York Public Service Law §99 contains similar requirements for transfers of franchises or certificates to provide telephone services.

⁹ Section 7 of the Clayton Act, 15 U.S.C. § 18.

¹⁰ See, e.g., PSC Case 98-C-0533, *Joint Petition of SBC Communications, Inc. And Southern New England Telecommunications Corporation for Approval of an Agreement and Plan of Merger*, Communications Division May 8, 1998 Memorandum filed at May 20, 1998 PSC Session, p. 3. See also, PSC Case 97-C-1804, *Petition of WorldCom, Inc. for Approval of the Transfer and Control of MCI Communications Corporation to WorldCom, Inc., Order Approving Merger Subject To Conditions And Denying Petitions For Rehearing*, effective June 2, 1998, pp. 5-6.

¹¹ For example, the New York City market is most lucrative in the world. New York State has developed more local service competition than any other state, and is the first market in which an RBOC has been granted entry to in-region long distance service.

The PSC should consider the competitive effect of the proposed merger on each and every relevant product and geographic market.¹² Moreover, the Commission should be cognizant of geographical differences in the relevant markets and should not rely, for example, only on the possible state of telecommunications markets in New York City to assess the public interest of the whole state.

The burden of proof rests with the petitioners to justify that their requested approval meets the public interest standard.¹³

1. The Long Distance Market In New York

Without question, the long distance market, with three major players, is currently highly concentrated, even with a host of much smaller players. This market would become even more concentrated if the second and third largest providers combine into one company. Currently, MCI/WC has approximately 17.5% of the long distance market in New York, Sprint has 5.8%, and AT&T has 61%.¹⁴

¹² In terms of commercial bargaining power relative to providers' power to dictate contract terms, telecommunications customer classes are generally divisible by size, separating residential and small business customers (with limited bargaining power) from large business customers, who have far greater ability to shape the commercial terms in dealings with telecommunications providers.

¹³ See, *Digital Paging Systems, Inc. v. PSC*, 360 N.Y.S.2d 931 (A.D. 3d Dept., 1974) (upholding PSC's denial of consent to acquisition of partial ownership of a beeper company where it was inconsistent with the public interest). See also, *Brooklyn Union Gas Company v. PSC*, 309 N.Y.S.2d 520 (A.D. 3d Dept., 1970) (affirming PSC's denial of gas utility's request to purchase out of state utility as not in the public interest).

¹⁴ See, *FCC Trends In Telephone Service*, September, 1999, Table 11.5, p. 11-11. Table 1 in the attached Appendix shows market concentration levels for the New York long distance market using the data in this FCC report. *Id.* Using the most recent data available, the Herfindahl-Hirschman Index of market concentration ("HHI") is 4,221 for 1998. The effect of an MCI/WC-Sprint merger would be to increase the New York long distance market's HHI by 203 points. The HHI is used by the U.S. Department of Justice and the Federal Trade Commission to

Thus, the petitioners bear a heavy burden to show that there are no significant anticompetitive effects from the merger on the long distance market in New York. In assessing the petition, the Commission should consider the following issues:

- How the existing New York long distance markets can be considered to be, as claimed by petitioners, “robustly competitive,”¹⁵ given such high concentration levels.

- Whether, in the current concentrated market, rates have been driven down to competitive levels, particularly given recent reductions in access charges and other costs.¹⁶

- Whether Bell Atlantic-New York’s (“BA-NY”) one-month old authorization to enter into the long distance market in New York will offset the proposed merger’s aggravation of market concentration.¹⁷ Assuming conservatively a BA-NY 20% market share in two years, the long distance market, while less concentrated, would still be highly concentrated, and would be less concentrated without the proposed merger than with a merger.¹⁸

assess market concentration levels. *See, Horizontal Merger Guidelines*, revised April 8, 1997, § 1.5 (“DOJ-FTC Guidelines”). The HHI is computed by totaling the square of each competing company’s market share. The Guidelines regard any HHI greater than 1,800 as “highly concentrated.” The Guidelines also state that in highly concentrated markets, any HHI increase of more than 50 points “potentially raise[s] significant competitive concerns.” *Id.*, § 1.51.

¹⁵ *Petition*, p. 21.

¹⁶ Although Petitioners claim, at p. 23, that long distance rates have decreased dramatically, this in itself does not necessarily prove that consumers are not being adversely affected by the exercise of market power by a few dominant carriers.

¹⁷ *Petition*, pp. 22-23. Petitioners predict that BA-NY will take from 20%- 26% of that market within two years of entry. *Ibid*, p. 23, fn. 37.

¹⁸ Table 2 of the Appendix displays the HHI if BA-NY’s projected 20% market share in 2002 is won from all existing providers proportionately. Table 3 performs the same calculation, but assumes that BA-NY’s share would be won entirely from current AT&T customers. Thus, if BA-NY in fact gains a 20% share of the New York residential toll market by 2002, the HHI measurement of market concentration will be reduced by one-fourth, despite the merger of

- Whether the proposed MCI/WC-Sprint merger will continue to reverse the prior fifteen year trend of decreasing market concentration (since the AT&T divestiture) already affected by the MCI/WC merger in 1998.¹⁹ If so, then the petitioners' arguments about ease of entry and unused capacity, which affect the potential significance of such market concentration levels, must be very carefully assessed.

- Whether the loss of competition between MCI/WC and Sprint will benefit consumers.

2. The Local Market

Without question, the markets for local service in New York are currently dominated by monopoly providers. BA-NY provided 86% of the telephone lines in New York in 1999. Frontier, the second largest local service provider, has 5% of the lines in the state. The remaining 40 incumbent local exchange carriers ("ILECs") operating in New York collectively provide 5% of the state's lines. Each of these providers are monopolies in their service territory

MCI/WC and Sprint. Although BA-NY's degree of success in entering the New York residential toll market is not certain, given the company's existing local service customer base, the recent example of SNET's toll entry (40% of the Connecticut market) (*see*, Petition, p. 23, fn. 37) and GTE's record of selling toll service to its local customer base, there is good reason to credit BA-NY's projections. Given the fact that BA-NY's share of the total U.S. toll market would be far smaller, this development might not be at all significant on a nation-wide basis. Tables 2 and 3 show that even with BA-NY's projected market share, the effect of the proposed merger in 2002 would be to increase the HHI by 159 to 203 points (depending on which current IXC's would lose customers to BA-NY), a reason for serious concern given the fact that this market would remain well in the "highly concentrated" range (at over 3,000, the HHI would be well beyond the 1,800 point threshold used in the FTC-DOJ Guidelines despite BA-NY's projected gain of 20%).

¹⁹ *See*, FCC 1999 *Trends In Telephone Service*, *supra*, Table 11.4, p. 11-8, which presents the national long distance revenues of the major carriers, and the HHI scores derived from their market shares. The chart begins in 1984 with an HHI of 4,734, and shows a continual decline through 1997, to an HHI of 1,958. However, the 1998 MCI-WorldCom merger increased the HHI to 2,148. Combining the 1998 shares of MCI/WC and Sprint to estimate the consequence of the proposed merger in 2002 from the data in this chart yields an HHI of 2,669, a 521 point increase over the current HHI.

and they do not compete directly for local service.²⁰

In terms of line counts, twelve CLECs collectively served only about 5% of the lines in New York as of September 1999. The largest New York CLEC by line count is AT&T, with approximately 300,000 lines in service (2%)²¹, followed by MCI, serving 150,000 lines (1%)²², and Lightpath, with about 45,000 lines (0.34%).²³ Sprint has begun to offer local service in New York in the last two months, but it currently has a negligible presence.²⁴

Despite BA-NY's dominance (it has nearly 11 million lines), competition in some New York local service markets is beginning and is expected to increase. Critically, however, the merger of MCI/WC and Sprint would reduce the number of well-financed national telecommunications companies that are in competition for local service customers in New York against the dominant BA-NY. Given the heavily concentrated nature of the New York local service markets and the enormous disparity in number of customer lines served by BA-NY as

²⁰ Data provided by PSC Staff. Local service revenue data, as opposed to line counts is not readily available, and might in any event not be publicly disclosable due to its competitive sensitivity.

²¹ The vast majority of AT&T's lines were acquired from TCG, and serve large business customers. Although AT&T has positioned itself to enter local telephony markets via cable television, a strategy that potentially would bypass the bottleneck services controlled by ILECs, this approach has not yet been deployed on a widespread basis and AT&T has currently only a minor cable presence in New York.

²² Most of MCI/WC's New York local lines serve residential and small business customers through unbundled network elements-platform ("UNE-P").

²³ See n. 20, *supra*. See also, semi-annual Communications Division reports to the Commission on CLEC service quality performance, Case 98-C-0581.

²⁴ Initially, Sprint's local service offering in New York is via resale of BA-NY's lines. However, according to statements made by Petitioners in informal meetings with this office, the company is currently bringing its own New York local switch on line in the near future.

compared with any of the CLECs, the elimination of a credible market entrant such as Sprint is troublesome. Sprint has a national reputation, New York customer base (from its share of the long distance market), brand name identification, experience as an ILEC in other states, and economic resources not possessed by most of the other CLECs that have entered the New York local market (other than AT&T and MCI). Thus, removal of this competitor could serve to weaken local competition at a crucial point in its development.

Petitioners argue that they need to combine their resources in order to make significant inroads into the local market, or to build alternative facilities-based means of serving customers, not dependent on ILEC bottleneck services. Petitioners do not demonstrate, however, that they would be unable to compete in this fashion were they to remain independent.

In addition to these issues, we urge the Commission to carefully consider:

- Whether the value²⁵ of the acquisition to MCI/WC translates into an equal benefit for consumers.²⁶

- Why MCI/WC and Sprint cannot each achieve the benefits of an acquisition without this particular combination.

- Whether the loss of competition between MCI/WC and Sprint would benefit consumers.

²⁵ Petitioners allege four benefits to a combined company: (1) maximization of MCI/WC's New York facilities through aggregation of Sprint's traffic; (2) their combined traffic would make greater facilities investment economic, providing alternatives to BA-NY's network; (3) Sprint's ION broadband service would benefit from being carried over MCI/WC's facilities; and (4) combining each company's MMDS licenses could reduce the need for end office collocation to deliver DSL services. *Petition*, pp. 18-19.

²⁶ If MCI/WC wants to add wireless voice service, it could either build its own service, or acquire another independent wireless provider, without having to merge with a key long-distance competitor like Sprint.

3. Alternative Projected Markets

Consumers and suppliers today recognize two basic markets, local and long-distance, whether provided through landline or wireless service. In urging the competitive benefits of this merger, petitioners seek to emphasize markets-to-be.

a. The Single-Carrier “Packaged” Market

Petitioners urge the Commission to focus on a projected future market for “packaged” telecommunications services by one provider²⁷ and argue that, if permitted to merge, the two companies will be “far better positioned” to offer “an alternative to the integrated services” BA-NY “will” offer than if they remain separate competitors.²⁸ Pointing to recent marketing developments in 1999 in which some telecommunications players have promoted various combinations of local, long distance, wireline, wireless, data and/or video services, petitioners maintain that a new market where multiple services are offered by a single carrier is likely to become a major component of the national telecommunications scene.²⁹

Petitioners’ projection, however likely in the long run, is highly speculative now and into the immediate future. Moreover, petitioners’ definition of such a market is quite vague and does not provide a basis to assess readily the proposed merger’s competitive impacts upon it. The actual product itself is not entirely clear. Petitioners have not stated with certainty which telecommunications services would be provided or through what technologies, much less to which customers, or to what parts of the state or country. Nor is it clear whether the offerings

²⁷ *Petition*, pp. 8-16.

²⁸ *Petition*, p. 12.

²⁹ *Petition*, p. 9.

envisioned by petitioners will be able to be “unpacked” by consumers. Finally, petitioners again fail to explain adequately why each of these companies will be unable to compete individually to provide such services and why it is essential for them to merge to provide them.

b. The “All-Distance” Market

Petitioners also envision an “all-distance” market. Such a market would be, perforce, quite new. No single competitor is likely to have a dominant role. Nor is it clear what barriers to entry would prevent both MCI/WC and Sprint from getting into such a market on the ground floor, before any player locks up a sizeable customer base. Both MCI/WC and Sprint, without becoming a single entity, currently have the capacity to offer various bundles of the local, long distance, wireline and wireless services³⁰ that an all-distance market envisions.³¹

c. Multichannel Multipoint Distribution Service

At the present time, neither company has yet demonstrated how it would actually use its MMDS fixed wireless licenses to deploy broadband services to residential and business customers, or how significant this alternative to the ILEC network would be in practice.³² Furthermore, since both Sprint and MCI/WC purchased MMDS licenses before this acquisition,, petitioners fail to show why either company needs to merge with the other in order to deploy this broadband service delivery strategy. Also, both Sprint’s ION service, and MCI/WC’s

³⁰ See, footnote 26, *supra*.

³¹ It is unclear how competition would be served by Sprint’s PCS wireless communications assets simply being merged into a combined entity. Sprint’s PCS would be an even better fit if the company remained separate from MCI/WC, and decided to offer an “all distance” bundled service of local, long distance and wireless service.

³² Because this technology depends on line-of-sight radio transmission, it may be more suitable for suburban markets, and might not support mass market offerings in urban or rural areas.

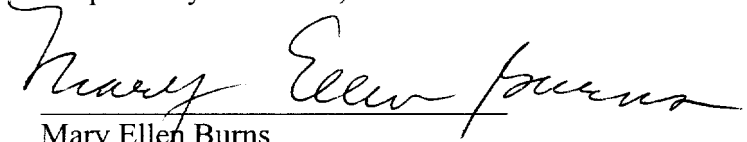
description of its plans to use MMDS to deliver broadband Internet services appear to be targeted primarily at business customers, and would not appear to benefit residential customers to any significant degree.

Conclusion

The Attorney General's Office urges the Commission to consider the proposed MCI/WC-Sprint merger with particular care and thoroughness. Petitioners have not yet met their burden to demonstrate that granting approval would serve the public interest in robust competition in all telecommunications markets in New York. Moreover, the anticompetitive effect of such an acquisition on the local and long distance markets in New York could be significant.

The record does not indicate whether the Commission has provided notice to petitioners under New York Public Service Law §§ 99 and 100 of its review so as to stop the statutes' ninety-day clock from running. Both DOJ and the FCC are still reviewing this acquisition. The Commission is not required to act in undue haste on such an important matter. We urge the Commission to examine fully the competitive impact of this acquisition on New Yorkers, based upon a complete record, so as to ensure that the laudable progress it has made to date in transforming the telecommunications industry in New York from monopoly towards market competition continues unimpeded.

Respectfully submitted,

A handwritten signature in cursive script, reading "Mary Ellen Burns".

Mary Ellen Burns
Assistant Attorney General In Charge
Telecommunications and Energy Bureau

Keith H. Gordon
Assistant Attorney General
of counsel

Appendix

Table 1
New York Market Share of Residential Toll Revenue*

	AT&T	MCI	Sprint	Teleglobe	Others	Total
1998 Share	61%	17.5%	5.8%	3.7%	12.1%	100.1%
HHI	3,721	306	34	14	146	4,221
Post Merger	61%	23.3%	n/a	3.7%	12.1%	100.1%
HHI	3,721	543	n/a	14	146	4,424

* Source: FCC Trends In Telephone Service, *supra*, Table 11.5.

Table 2
Forecast Of New York Residential Toll Revenue Market Shares In 2002
Assuming Bell Atlantic-New York Draws Customers Proportionately From All IXC's

	AT&T	MCI	Sprint	BA-NY	Teleglobe	Others	Total
2002 Share w/o Merger	48.8%	14%	4.64%	20%	2.96%	9.68%	100.1
HHI	2,381	196	22	400	9	94	3,102
2002 Share w/Merger	48.8%	18.64%	merged	20%	2.96%	9.68%	100.1%
HHI	2,381	377	0	400	9	94	3,261

Table 3
Forecast Of New York Residential Toll Revenue Market Shares In 2002
Assuming Bell Atlantic-New York Draws Customers Entirely From AT&T

	AT&T	MCI	Sprint	BA-NY	Teleglobe	Others	Total
2002 Share w/o Merger	41%	17.5%	5.8%	20%	3.7%	12.1%	100.1
HHI	1,681	306	34	400	14	146	2,581
2002 Share w/Merger	41%	23.3%	merged	20%	3.7%	3.7%	100.1%
HHI	1,681	543	0	400	14	146	2,784